Beker Industries Corp. *and* Floyd A. Becnel, Jr.
Case 15-CA-8860

16 February 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 29 September 1983 Administrative Law Judge Russell M. King Jr. issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] In sec. II, A, of his decision, the judge correctly states that the General Counsel asserts only that Charging Party Becnel's individual refusal to report for work was protected under Sec. 502 of the Act, and does not advance any other theory. In this regard, we note that at the hearing counsel for the General Counsel assured the Respondent that he was "not attempting to expand the complaint theory into a protected concerted activity theory."

We agree with the judge's conclusion that, the factual predicate of Sec. 502 not having been established, the issue whether Sec. 502 modifies Sec. 7 is moot, and we intimate here no prediction of our ultimate resolution of the question when and if the issue is presented to us squarely.

DECISION

RUSSELL M. KING, JR., Administrative Law Judge: This case was heard by me in New Orleans, Louisiana, on July 6 and 7, 1983. The charge was filed by the individual Floyd A. Becnel, Jr., on January 25, 1983, and the complaint was issued on April 22, 1983, by the Regional Director for Region 15 of the National Labor Relations Board (the Board) on behalf of the Board's General Counsel.[1] The complaint alleges that the Respondent Employer (the Company) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by discharging employee Becnel on December 13, 1982, because he failed to report for work as requested on December 11, 1982.[2] The complaint further alleges that Becnel "withheld his labor" because of abnormally dangerous conditions at the Company's facility on December 11, and that Becnel was protected in this action by Section 502 of the Act.[3]

There is no union or union contract involved in this case, and the Company defends on the grounds that Section 502 of the Act does not apply where no union contract is involved containing a "no-strike" clause, and further that on December 11 no abnormally dangerous conditions existed at its facility involved herein.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed herein by the General Counsel and counsel for the Company, I make the following

FINDINGS OF FACT[4]

I. JURISDICTION

The Company is a corporation licensed to do business in the State of Louisiana and maintains a place of business or facility in Hahnville, Louisiana, where it is engaged in the manufacture of fertilizer and fertilizer components. During the 12 months preceding the issuance of the complaint herein, a period which is representative of all times material herein, the Company, in the course and conduct of its operations at its Hahnville facility, purchased and received goods and materials valued in excess of $50,000 directly from points located outside the State of Louisiana. During the same period, the Company at the facility sold and shipped goods and materials valued in excess of $50,000, directly to facilities located outside the State of Louisiana. Thus I find, as admitted, that the Company has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[1] The term "General Counsel," when used herein, will normally refer to the attorney in the case acting on behalf of the General Counsel of the Board through the Regional Director.

[2] All dates hereafter are in 1982 unless otherwise stated.

[3] The pertinent parts of the Act (29 U.S.C. §151, et seq.) provide as follows:

> Sec. 8. (a) it shall be an unfair labor practice for an employer—
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . .
> . . . .
> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .
> . . . .
> Sec. 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

[4] The facts found herein are based on the record as a whole and on my observation of the witnesses. The credibility resolutions herein have been derived from a review of the *entire* testimonial record and exhibits with due regard for the logic of probability, the demeanor of the witnesses, and the teaching of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those testifying in contradiction of the findings herein, their testimony has been discredited either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. *All* testimony and evidence, regardless of whether or not mentioned or alluded to herein, has been reviewed and weighed in light of the *entire* record.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Employer Floyd Becnel was hired by the Company on March 7, 1979, as a material handling technician. Becnel worked the "D" or night shift at the plant from 7 p.m. to 7 a.m. He reported for work as usual on Friday, December 10, at 7 p.m. At approximately 12:30 a.m. (December 11) an "acrolein" storage tank at a Union Carbide Corporation plant approximately one-half mile southeast of the Company's facility ruptured, resulting in an explosion, fire, and the release of fumes at the Union Carbide facility. Both facilities were located in St. Charles Parish, Louisiana. At approximately 3:30 a.m., Union Carbide officials, together with parish and other public officials, determined that all residents within a 5-mile radius of the Union Carbide facility should be evacuated. The evacuation order was given by the parish president at approximately 4:30 a.m. The evacuation was voluntary. Becnel worked to the end of his shift at 7 a.m. on December 11 when he left the plant and returned home. Becnel was scheduled to come to work at the normal time (7 p.m.) on Saturday, December 11, and about 4:30 that afternoon he had been called and requested to do so. The state police had closed all of the roads leading to the area. However, personnel from the various plants in the area were permitted access to their plants through a procedure whereby the names of the employees were given to a central control center and as they came to a roadblock, the police would radio the control center to check whether or not that particular name was on one of the lists submitted by the various plants in the area. Although other employees reported to work at the Company for the 7 p.m. shift on December 11, after having been called by phone, Becnel failed to do so. For this reason, Becnel was discharged on December 13. In this case, the General Counsel asserts only Becnel's individual refusal to report for work was protected under Section 502 of the Act, and does not advance any other theory such as "concerted" activity.

B. *The "Abnormally Dangerous Condition" Issue*

The explosion at approximately 12:30 a.m. on December 11 was an event of some moment at the time. The Union Carbide plant was approximately one-half mile from the Company's facility. The explosion was loud and, as indicated by Shift Supervisor Lester Haber, it scared everybody. The plant immediately lost power and, according to Haber, he had some burning sensation, together with a distinct smell with some irritation. Haber added that this all stopped about 3 a.m. He learned of the evacuation order at approximately 5 or 5:30 a.m. whereupon he notified his superior and told the employees. Becnel testified that after the explosion one of his ears went deaf for 2 hours, and that he also smelled a strong odor of vinegar which burned his eyes, nose, and throat, and caused a pain in his chest. Becnel related that he was told to go inside at approximately 1:30 a.m. where he remained until approximately 3:15 a.m. when he was told to go back to work. Becnel indicated that when he went back outside he still smelled the odor and still had a burning sensation, but that he worked until 6 a.m. when he went back inside and heard that they were shutting down the plant. Becnel remained at the plant until the end of his shift at 7 a.m. and testified that on the way home he heard the evacuation order on the car radio. Becnel's home was some 20 miles away from the plant and upon his arrival he went to bed.

Jay Lee Goodson, Jr., testified as the assistant plant manager for Union Carbide, where the explosion occurred. Goodson is a chemical engineer and related that after the tank eruption there was an explosion and fire, adding that the substance in the tank was "acrolien," which was a toxic substance. Goodson indicated that there were six adjacent tanks, within 100 feet of the exploding tank, and that his primary worry was concern about the adjacent tanks. Goodson testified that he decided on the evacuation between 3 and 4 a.m. because of the potential posed by the adjacent tanks, but that between 7 or 8 a.m. he recommended a partial lifting of the evacuation. According to Goodson, none of Union Carbide employees refused to work. Parish President Kevin Frilous verified that the evacuation order was issued at 4:30 a.m. on Saturday, December 11, and was ended at 12 noon on Sunday, December 12. One Henry Fried testified as a news director for a local FM station. During the critical time, Fried indicated that the station put out several news reports about the evacuation and the reasons therefor. Several of these reports were admitted into evidence. It was this station that Becnel listened to when he left the plant at 7 a.m. on December 11. Benjamin H. Farrow testified as the Company's plant manager. Farrow indicated that he alone made the decision to discharge Becnel because he refused to report to work. Farrow described the situation at the plant as an emergency situation which necessitated the service of all available employees. Contributing to this situation were several of the Company's barges which got loose from their dockage because of the explosion and the high level of the river and wind conditions. According to Farrow, when he arrived at the plant at approximately 6:30 or 7 a.m. on December 11, all effects of the explosion had disappeared and the plant was then up wind from the Union Carbide plant. The Company's wind direction chart was admitted into evidence and it indicates that at approximately 3 a.m. on December 11 the wind had changed some 75 degrees and that trend continued, and by 7 p.m. on December 11, when Becnel was due to report for work, the degree of change was 285. Farrow testified that by 11 a.m. on December 11 all of the dayshift employees had reported. Farrow related that he himself talked to Becnel by phone at approximately 6 p.m. on December 11 and requested Becnel to report to work at the regular time because he was needed due to the unusual conditions at the plant, including the barges which were loose on the river. Becnel questioned Farrow as to the conditions at the plant and Farrow assured him that it was safe for him to report to work. Becnel apparently did not commit himself at that time one way or the other, but ultimately failed to report for his shift at 7 p.m. Jules Hymel testified as the assistant Civil Defense director for the Parish, and testified that

employees of the plants in the area were allowed into work. Hymel further testified that Becker Industries was not directly notified of the evacuation order, although the local FM radio station was notified at approximately 4:29 a.m. The evidence reflects that during the entire day on December 11 (midnight to midnight) some 28 employees were scheduled to work at the Company's plant. Out of those 28 employees, 2 did not work because of illness, 2 were on vacation, 2 could not be reached by phone and were excused without pay, 1 could not be reached and was excused with pay, and 1 employee, Becnel himself, refused to report to work. There were a number of employees who did not report to work for the shift beginning 7 a.m. on December 11. All of these employees that were not excused for various reasons had reported by 11 a.m. and during the 4-hour period between 7 and 11 a.m. they were excused with pay. The plant was virtually closed down between 7 and 11 a.m. on December 11. Becnel testified that, prior to talking to Farrow by phone about 6 p.m. on December 11, he had received a telephone call from employee James Wipple about 4:30 p.m. from the plant. Wipple told him they wanted him to come out to work. According to Becnel, he then asked Wipple about the conditions at the Union Carbide plant, to which Wipple replied that the conditions had not changed, adding that Becnel should tell the police officers at the road block that he was part of the Company's emergency squad in order to get past the road block. Becnel related that he also listened to the FM station's 5 p.m. news report which indicated that between 13,000 and 25,000 people were evacuated from the area earlier in the day because officials were concerned about the potential of further explosions. Becnel also testified that based on this and other information he decided that it was an extremely dangerous situation at the plant and thus during his telephone conversation with Farrow he related his conclusion that he thought it was unsafe.

The Supreme Court has defined the test as to when the existence of "abnormally dangerous conditions for work" invokes the protection of Section 502 of the Act. *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974). The Court indicated that there must be some identifiable, presently existing threat to the employees' safety rather than a generalized doubt. The Court further stated that to enable one to invoke the protections of Section 502 there must be present before him "ascertainable, objective evidence supporting [the] conclusion that an abnormally dangerous condition for work exists." The Board had earlier addressed the question in the case of *Redwing Carriers*, 130 NLRB (1961), supplemental decision and order 137 NLRB 1545 (1962), enfd. sub nom. *Teamsters Local 79 v. NLRB*, 325 F.2d 1011 (1963), cert. denied 377 U.S. 905 (1964). Here the Board also applied an "objective" test stating that what controls "is not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered abnormally dangerous." In evaluating the evidence in this case, I cannot find or conclude that an abnormally dangerous condition for work existed at the Company's plant either at 6 p.m. or 7 p.m. on December 11 or at any time thereafter. Plant Manager Farrow so concluded when he requested that Becnel report for work at his regular time (7 p.m.). By that time the wind had significantly changed hours ago and had remained stable. The movement of employees into various plants in the area was in full swing at least by 11 a.m. and most of the Company's employees had reported to work as requested. At the time, the Company needed its employees at work and Becnel was the only one who actually refused to report. I do not rule here on Becnel's good-faith belief or doubt as to the safety of the conditions at the plant. The law simply requires more in the form of actual objective and competent evidence as to the actual conditions that existed at the very time that Becnel was to report to work. Having found that the General Counsel has not established in this case by a preponderance of the evidence that abnormally dangerous conditions existed, I find and conclude that Becnel's refusal to report for work was not protected by Section 502 of the Act, and that his discharge therefore did not violate Section 8(a)(1) of the Act.

C. *The Applicability of Section 502 of the Act*

My finding that no "abnormally dangerous conditions" existed when Becnel was to report to work in effect disposes the entire case. The issue as to whether Section 502 of the Act applies in this case is moot. The issue was raised in *Redwing Carriers*, supra, but the Board did not meet the issue, simply stating as follows:

> We need not decide whether, had there existed "abnormally dangerous conditions," Section 502 would afford affirmative protection to these complainants, for upon careful consideration of all the pertinent evidence, we cannot conclude that the General Counsel has established the existence of such conditions.

As the Board did, I also choose not to decide the issue herein. The issue is somewhat novel and the legislative history of Section 502 affords no clarification. As initial reading of the Supreme Court's decision in *Gateway Coal Co.*, supra, would lead one to the conclusion that Section 502 only applies where there is a union contract with a no-strike obligation. The Court stated that Section 502 "provides a limited exception to an express or implied no-strike obligation." The Supreme Court later confirmed this interpretation when it stated in *Whirlpool Corp. v. Marshall*, 445 U.S. 1 fn. 29 (1980), "The effect of [Section 502] is to create an exception to a no strike obligation in a collective-bargaining agreement," citing *Gateway Coal Co.*, supra. Section 502 of the Act reads in part as follows:

> Nor shall the quitting of labor by *an employee* or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such *employee* or employees be deemed a strike under this Act. [Emphasis added.]

However, Section 501(2) of the Act defines the term "strike" as follows:

> The term "strike" includes any strike or other concerted stoppage of work by *employees* . . . and any concerted slow-down or other concerted interruption of operations by *employees.* [Emphasis added.]

The General Counsel argues in this case that Section 502 of the Act applies to an individual employee and also where no union contract is involved. The General Counsel would also extend Section 502 to modify Section 8(a)(1) and Section 7 of the Act, thus eliminating the requirement that employees must engage in "concerted activity" before they are afforded protection from discrimination in their employment under Section 8(a)(1) of the Act. What Section 502 unquestionably does do is to prevent the successful defense of unprotected activity in a case where it is shown, by the applicable standards of evidence, that employees withheld their labor because of abnormally dangerous working conditions. To extend Section 502 to not only include one individual employee where no union contract exists and further to serve as a congressional modification of Section 7 of the Act are rather large and significant steps. I judge that the Board will tackle the issue head-on in the future in an appropriate factual case.

Upon the foregoing findings of fact and initial conclusions, and upon the entire record, I make the following

CONCLUSIONS OF LAW

1. The Respondent Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The discharge of employee Floyd A. Becnel, Jr., by the Respondent Employer on December 13, 1982, did not violate Section 8(a)(1) of the Act.
3. The Respondent Employer in this case has not otherwise violated the Act.

On these findings of facts and conclusions of law and on the entire record, I issue the following recommended

ORDER[5]

It is ordered that the complaint herein be, and the same is hereby dismissed.

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[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.